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In The

Supreme Court of the United States

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Petitioner,

v.

GEORGE W. HENGLEIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether acts and events which occurred both before and subsequent to the enactment of ERISA should be considered in accordance with ERISA's standards and requirements where the petitioner failed to take any effective action to terminate plans providing employee benefits prior to ERISA's enactment and continued to engage, subsequent to ERISA's enactment and until 1982, in a course of conduct intended to grossly mislead the Employees concerning the benefits they would be entitled to in the event of a plant shutdown.

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ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE PLAN IS JUDICIALLY ESTOPPED FROM RADICALLY REVERSING POSITIONS ADOPTED DURING THE FIRST SEVERAL YEARS OF THIS LITIGATION CONCERNING BOTH THE SIGNIFICANT FACTS AND THE APPLICABLE LAW.

A. The Third Circuit Correctly Established The Standard For Determining The Existence Of The Plan At The Time Of The Shutdown.

Concerning the 1972 Board Resolution purporting to rescind the Informal Plan – to which the defendant now attaches great importance – the panel in *Henglein et al. v. Informal Plan for Shutdown Benefits for Salaried Employees*, 947 F.2d 391 (3d Cir. 1992) (*Henglein I*), declared that:

> Although an unpublicized repeal of a published program for providing benefits may evince some intent not to maintain that program, the district court must also consider public actions of the company. . . . Thus, if the company had continued to promise to pay the plan's benefits, the company's promises would be evidence that the company had maintained the plan, despite the resolution. Similarly, if the company deliberately failed to inform the employees of the plan's putative repeal, that too would indicate that the company maintained the plan. It would be for the district court . . . to determine whether the employees have proved the existence of a plan after considering any conflicting evidence. (at 401)

The District Court's Findings of Fact 93-226 (at 34a-60a), prepared after 11 days of trial at which 38 of the

Employees and 7 witnesses on behalf of the defendant testified, provided overwhelming support for its basic conclusion, set forth in FOF 226 that: "Crucible, Inc., deliberately failed to correct the plaintiffs' known perceptions that there existed a program which would provide salaried non-union employees with additional benefits in the event of a plant shutdown."

Applying the Findings of Fact of the District Court in accord with the guidelines provided by *Henglein I*, as quoted above, it necessarily follows, as the District Court concluded, that the Informal Plan did exist in 1982 despite the 1972 Resolution. On appeal in *Henglein et al. v. Colt Industries Operating Corp., Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 260 F.3d 201 (3d Cir. 2001) (*Henglein IV*) (100a-123a), the panel affirmed the rulings of the District Court and noted that:

> The Plans again repeat their arguments that the Crucible severance benefits were abolished before ERISA came into existence. These contentions, however, simply reiterate the points unsuccessfully advanced in *Henglein I*, *Henglein II* and *Henglein III*. (at 122a)

B. ERISA Is To Be Applied To Pre-ERISA Acts And Omissions When Post-ERISA Acts Are Of Substantial Importance And Not Mere Formalities.

The circuits are essentially in agreement that where post January 1, 1975 events such as a denial of benefits are the foreseeable or inexorable results of pre-ERISA acts there would be no preemption of state law by ERISA but that where the post-ERISA acts are more substantially

related to the cause of action ERISA is fully applicable. Each of the five cases cited by the petitioner as holding that ERISA may not be applied to pre-ERISA acts simply held that the pre-ERISA acts were of critical importance to the plaintiffs' cause of action or that they involved "all the operative acts and omissions." Thus, in *Quinn v. Country Club Soda Co. Inc.*, 639 F.2d 838 (1st Cir. 1981) in which ERISA was held to have no preemptive effect it was stated that, "The post-1975 events were, therefore, but the inexorable consequences of acts and omissions taken long before." (at 841). In *La Montaigne v. United Wire, Metal and Mach. Pension F.*, 869 F.2d 153 (2d Cir. 1989) the court, in refusing to apply ERISA, stated that: " . . . the act central to *La Montaigne*'s case was the plan's pre-1975 adoption of the break in employment policy . . . the 1978 denial of his pension application was merely a consequence of [that] policy" (at 156). In *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) another case in which the court refused to apply ERISA it was stated that: "*Menhorn*'s cause of action accrued in 1980 when his claim for benefits was denied. But all the operative acts and omissions forming the basis for *Menhorn*'s claim and Firestone's denial occurred before January 1, 1975". (at 1498) Similarly, in *Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333 (11th Cir. 2000) the court noted: "When participants' rights form before ERISA's effective date, the courts as a matter of federal common law must interpret the plan 'in light of a worker's pre-ERISA's state law right.' " (at 1337) In *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444 (6th Cir. 1992), the court stated that: " . . . if the operative events on which a pension plan bases a benefit decision

occurred before January 1, 1975, there is no ERISA pre-emption and, consequently, no ERISA jurisdiction . . . the ultimate benefit decision was completely dictated by the pre-1975 event." (at 452)

However, when the post-ERISA acts are considered to be of critical, substantial or of central importance to the cause of action, ERISA will be applied fully. Thus, in *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982), the court noted that it had previously applied ERISA to a cause of action based in part, on acts occurring before ERISA became effective. In *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981), the court had dealt with " . . . a plan – which was enacted, and to which plaintiff had made contributions only prior to the preemption date – operated to deny plaintiff benefits because he continued to be employed in a particular industry while seeking benefits."

> The court found ERISA applicable to the benefits denied after ERISA's effective date because the denial was the result of plaintiff's act of continuing to be employed by an employer participating in the plan after ERISA became applicable to that plan. *Id.* at 657 & n.8. The distinction between *Smith* and the cases declining to apply ERISA seems apparent. In each of the other cases, the acts after the pre-emption date were merely formalities adjunct to a set of acts before the preemption date which were more substantially related to the cause of action. In *Smith*, the most substantial act operating to deny plaintiff benefits was an act – his employment in a particular industry – which occurred after the effective date. (at 410)

Virtually identical reasoning was articulated in *Chase v. Trustees of W. CON. Of T. Pension T.F.*, 753 F.2d 744 (9th Cir. 1985) in which ERISA was found to have preempted state law:

> The *critical* act which precipitated this action was the trust fund's 1979 decision that the owner-drivers' participation in the plan should be terminated. The discovery of the mistake, our decision in *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975) – which led to the discovery of the mistake – the owner-drivers' demand for a refund, and the trustees' refusal to refund the contributions are all post-January 1, 1975 acts which are substantially related to the cause of action. The trustees' discovery of the error and their refusal to refund the contributions are not mere formalities – *Lafferty*, 666 F.2d at 410 – or the "inexorable consequences" of pre-ERISA acts. *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981). (at 747) (emphasis added)

C. Post-ERISA Acts Were Of Critical Importance To The Employees' Claims.

Colt's appellate brief in *Schake v. Colt Industries*, No.: 85-3381 dated September 30, 1993, provides a useful guide to the resolution of the question of whether acts relating to a claim following the enactment of ERISA were "mere formalities" or were of "critical" importance to the claim. Thus it was stated at page 18 of that appellate brief that:

> Similarly, the significant "acts or omissions" relating to the Employees' cause of action

> occurred if at all *after* January 1, 1975. *e.g.*, the closing of the Midland plant in 1982; the Employees' service between 1975 and 1982 (the eliminated plant shutdown benefits had age and service requirements that could not have been fulfilled by the vast majority of the Employees until between 1975 and 1982, if at all); the employer's supposed silence about the elimination of earlier plant shutdown benefits between 1975 and 1982; the Employees' alleged impression that they would be eligible for a plant shutdown benefit between 1975 and 1982 and the refusal by the employer to amend the Formal Pension Plan in 1982 to grant a plant shutdown benefit. Where, as here, the alleged acts or omissions after the preemption date are not mere formalities related to the cause of action, ERISA fully applies. *Lafferty v. Solar Turbines International*, 666 F.2d 408, 410 (9th Cir. 1982); *Chase v. Western Teamsters Pension Fund Trustees*, 753 F.2d 744, 746 (9th Cir. 1985).

Consistent with the position then taken concerning when significant "acts or omissions" occurred, Colt's appellate brief also asserted that:

> . . . there can be no serious question that ERISA does govern their claims. Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1), provides that ERISA preemption of state law shall apply with respect to any cause of action which arose, or any act or omission which occurred, on or after January 1, 1975. (at 19)

Additional assertions concerning the impact of ERISA upon preexisting state law can be found in the Plan's appellate brief in *Henglein I* dated September 23, 1991 and signed by William Powderly, III, of the Jones,

Day, Reavis and Pogue firm. "As of 1982, ERISA was the governing law and all previously applicable state law had been preempted." (at 20) "When the relevant provisions of ERISA became effective on January 1, 1975, they *completely preempted state law* theories of recovery for benefits claims accruing thereafter." (emphasis added) (at 20, n.8) The opinions of the Third Circuit in both *Schake* and in *Henglein I*, fully adopted the views expressed above by Colt in Schake and the Plan in *Henglein I* concerning the effect of ERISA upon preexisting law. The law that has evolved since the briefs quoted above were written has, if anything, further emphasized the preemptive effects of ERISA upon preexisting state law.

A remarkably different factual picture was presented in the Plan's appellate brief in *Henglein v. Informal Plan for Shutdown Benefits for Salaried Employees*, No. 94-3074 (3d Cir. 1993) (*Henglein III*), May 16, 1994. Instead of all significant acts occurring *after* January 1, 1975, it seems that they actually took place ***before*** January 1, 1975.

> Indeed, *all* of appellants' documentary evidence pre-dates ERISA. The mainstay of appellants' arguments, the Lobb memo (P.1, Ex.5) and the Francis memo (cover of P.1, Ex.4) are dated within days of each other on September 9 and 12, 1968. Moreover, most of appellants' testimonial evidence also relates to events that predate ERISA. (emphasis in original) (at 21)

In accordance with its revised position concerning when significant acts or omissions took place, the 1994 Petition of the Plan for Certiorari, following the ruling in

Henglein III, asserted, at page 16, that ERISA was improperly applied, "to events that occurred and were concluded before ERISA became effective."

In the QUESTION PRESENTED FOR REVIEW at (i) of the current Petition reference is made "to benefit accrual decisions completed before the effective date of ERISA. . . . "

D. The Facts Of This Case Call For The Application Of Judicial Estoppel.

The Plan is estopped from contradicting its earlier contentions concerning the preemptive affect of ERISA. 18 *Moore's Federal Practice*, 3d § 134.30, pages 134-62, 134-63 asserts as follows:

> **Doctrine Of Judicial Estoppel Prevents Assertion Of Inconsistent Claims**
>
> The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable concept "intended to prevent the perversion of the judicial process. It is to be applied where 'intentional self-contradiction is being used as a means of obtaining unfair advantage.' "

A similar statement can be found in the Third Circuit opinion in *Anjelino v. New York Times Co.*, 200 F.3d 73 (3d Cir. 1999).

> . . . we find no cause for disturbing the court's application of judicial estoppel to "preserve the integrity of the courts by preventing litigants

> from '**playing fast and loose with the courts.**' " (at 100) (emphasis added)

The court in *Scarano v. Central R. Co. Of New Jersey*, 203 F.2d 510 (3d Cir. 1953), similarly declared that:

> Such use of inconsistent positions would most flagrantly exemplify that playing '**fast and loose with the courts**' . . . has been emphasized as an evil the courts should not tolerate. (emphasis added)
>
> . . . And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. (at 513)

The Plan's attorneys have never attempted to explain their total reversal of position on both the relevant facts and the governing law – although such tactics have undoubtedly contributed to the extensive and tragic delays (**presently extending to almost 19 years – during which time 21 Employee participants have died**) this lawsuit has been subjected to.

Nor have the Plan and its attorneys sought to provide any justification for their insistence in arguing in *Henglein et al. v. Informal Plan for Shutdown Benefits for Salaried Employees*, No. 93-3219 (3d Cir. 1993) (*Henglein II*) and again in *Henglein III*, and again before the District Court in 1996, that state law exclusively governed all pre-ERISA acts, even though the Third Circuit had repeatedly ruled that where a course of conduct straddles the enactment of ERISA, a court must apply ERISA to that entire body of conduct.

II. PETITIONER GROSSLY OVERSTATES THE CONFLICT EXISTING AMONG THE CIRCUITS.

Varying decisions concerning whether ERISA should be applied so as to preempt preexisting state law have resulted from the differing factual pictures presented by the cases, not from varying concepts concerning the preemptive effect of ERISA.

The petition, at page 8, places the Ninth Circuit among the circuits claimed to have held that ERISA does not govern pre-ERISA conduct on the basis of its ruling in *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496 (9th Cir.1984). That same Ninth Circuit, in *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1985) and *Chase v. Trustees of W. CON. Of T. Pension T.F.*, 753 F.2d 744 (9th Cir. 1985), held that ERISA would have preempted state law in those cases in which critical acts relating to the causes of action occurred after the enactment of ERISA.

III. THE CURRENT PETITION ESSENTIALLY DUPLICATES THE PLAN'S EARLIER PETITION, WHICH WAS DENIED BY THE COURT.

The 1994 Petition for Supreme Court review (No. 94-1331), following the Third Circuit's ruling in *Henglein III*, presents essentially the same issue which the Petitioner now seeks to have reviewed a second time: the applicability of ERISA to pre-ERISA acts when substantial acts relating to the plaintiffs' cause of action took place following the enactment of ERISA.

The propriety of multiple petitions on the same issue is open to serious question. In *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L. Ed. 969 (1858) the court stated that:

> To allow a second writ of error or appeal to a court of last resort on the same question which were open to dispute on the first, would lead to endless litigation. . . . [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petition.

Respectfully submitted,

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